UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,
Ex Rel. Dale Thomas Vosika
and Rob Thompson,

Plaintiffs,

v.

Starkey Laboratories, Inc.,

Defendant.

Civil No. 01-709 (DWF/SRN)

MEMORANDUM OPINION AND ORDER

Robert J. Hajek, Esq., Warchol Berndt & Hajek, 3433 Broadway St. NE, Ste. 110, Minneapolis, MN 55413, counsel for Plaintiffs.

Bradley J. Betlach, Esq., Cynthia P. Arends, Esq., and Janice Marie Symchych, Esq., Halleland Lewis Nilan Sipkins & Johnson, 220 6th St. S., Ste. 600, Minneapolis, MN 55402, counsel for Defendant.

Introduction

The above-entitled matter came on for hearing before the undersigned United States District Judge on July 23, 2004, pursuant to Defendant Starkey Laboratories, Inc.'s Motion to Dismiss. For the reasons stated below, Defendant's motion is denied.

Background

According to the Second Amended Complaint, Defendant Starkey Laboratories, Inc. ("Starkey") is a Minnesota corporation headquartered in Eden Prairie, Minnesota. Starkey manufactures and sells hearing aids and accessories, parts, and supplies for hearing aids. Plaintiff Rob Thompson has been employed in various positions at Starkey since April 1991. Currently, Thompson serves as marketing program manager. Plaintiff Dale Vosika was employed by Starkey for approximately 20 years, from 1979 to 1999.

In 1994, the Department of Veterans Affairs (the "VA") solicited proposals for the purchase of custom hearing aids under the Multiple Award Scheduling ("MAS") contracting protocols of the General Services Administration ("GSA"). Starkey responded to the VA's solicitation by providing the required data. The response data described the price discounts offered to Starkey's commercial accounts and also provided an additional aggregate discount. Starkey identified its commercial pricelist as the basis for the discounts.

Elaine Williams, the VA's assigned contracting officer, reviewed Starkey's offer. Williams prepared a written price analysis and pre-negotiation memorandum. In the memorandum, Williams indicates the VA's objective price targets for various goods and services. Williams submitted a counteroffer to Starkey consistent with the objective price targets she set out in the pre-negotiation memorandum. Starkey responded to the VA's request for additional concessions by offering a discount on certain goods and services. Williams reviewed Starkey's counteroffer and prepared two price negotiation memoranda. Based on a review of these memoranda, the Director of the VA's Acquisition Policy and Review Services allowed the award.

Starkey entered into a contract to sell hearing aids to the VA from October 1, 1994, to September 30, 1996. The contract was amended on March 21, 1996, and extended until September 30, 1997. The contract contained the following Most Favored Customer ("MFC") provision:

> Price Reduction Clause (I-FSS-390): For the purpose of the Price Reduction Provisions, this contract is predicated on the Government receiving terms better than the terms you offer to your dealers (dispensers).

(Affidavit of Janice M. Symchych, ¶ 2, Ex. A at 494-496.) Plaintiffs assert that, during the contract period, Starkey sold hearing aids to two of its customers, Evans Hearing Aid Center and Trinity Hearing Aid Company, at prices less than the prices fixed in the contract with the VA.

Plaintiffs, as relators, brought this *qui tam* action on behalf of the United States under the False Claims Act ("FCA"), 31 U.S.C. § 3729, *et seq.*, asserting that Starkey submitted false pricing data to the VA while the contract was being negotiated and that Starkey failed to rebate price reductions to the VA based upon lesser-priced sales. Plaintiffs assert that Starkey's conduct was part of a scheme to knowingly charge the VA more for its purchases than was charged to Starkey's most favored customers. Plaintiffs assert that the entire amount of each invoice submitted to the VA for hearing aids during the entire contract period resulted in a false and fraudulent claim subject to damages under the FCA.

Initially, Starkey brought a motion to dismiss the suit on two grounds. First, Starkey asserted that Plaintiffs failed to satisfy the particularity requirements for pleading fraud set out in Fed. R. Civ. P. 9(b). Second, Starkey contended that, pursuant to the FCA's six-year statute of limitations, all claims occurring before December 18, 1995, should be dismissed with prejudice. In response, this Court dismissed the action without prejudice so that Plaintiffs could file a Second Amended Complaint that met the particularity requirements. The Court declined to rule on Starkey's Motion to Dismiss insofar as it sought a ruling on the effect of the FCA's statute of limitations on Plaintiffs' claims.

On April 19, 2004, Plaintiffs filed their Second Amended Complaint. Starkey filed a second Motion to Dismiss on June 1, 2004.

Discussion

I. Standard of Review

In deciding a motion to dismiss, the Court must assume all facts in the Complaint to be true and construe all reasonable inferences from those facts in the light most favorable to the complainant. *See Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). The Court grants a motion to dismiss only if it is clear beyond any doubt that no relief could be granted under any set of facts consistent with the allegations in the Complaint. *See id.* The Court may grant a motion to dismiss on the basis of a dispositive issue of law. *See Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The Court need not resolve all questions of law in a manner which favors the complainant; rather, the Court may dismiss a claim founded upon a legal theory which is "close but ultimately unavailing." *Id.* at 327.

A. Statute of Limitations

Pursuant to 31 U.S.C. § 3731(b), an FCA claim may not be brought: (1) more than 6 years after the date on which the violation of section 3729 is committed; or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

Starkey asserts that Plaintiffs' allegations based on claims that Starkey submitted to the VA prior to December 18, 1995, are barred by the FCA's six-year statute of limitations. First, Starkey asserts that the FCA's equitable tolling provision is not available to private relators. Second, Starkey asserts that the Plaintiffs have failed to establish that their Second Amended Complaint relates back to their original complaint. Third, Starkey asserts that the FCA's statute of limitations began to run upon submission of each of the allegedly false claims.

Plaintiffs do not discuss the availability of the FCA's equitable tolling provision. Instead, Plaintiffs cite to the Court of Claims' decision in *TS Infosystems, Inc. v. U.S.*, 36 Fed. Cl. 570 (Fed. Cl. 1996), in support of their assertion that the FCA's statute of limitations does not begin to run until the government makes its final payment pursuant to a series of transactions under the contract. *See id.* at 573. Plaintiffs also assert that their Second Amended Complaint relates back to their original complaint.

The Court finds that the FCA's six-year statute of limitations is applicable to Plaintiffs' claims. The Court has also reviewed the Plaintiffs' original sealed Complaint and their Second Amended Complaint and finds that the claims set forth in the Second Amended Complaint "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). Therefore, the Court finds that the Second Amended Complaint relates back to the original Complaint and that the statute of limitations ceased running from the filing of the original Complaint.

The Court recognizes that courts across the country are split on whether the FCA's statute of limitations begins to run when a claim is made by a business entity to the government or when it is paid by the government. However, the Court believes the better rule is that the statute of limitations "begins to run on the date the claim is made, or, if the claim is paid, on the date of payment." *United States ex* *rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157 (2nd Cir.1993) (quoting *Blusal Meats, Inc. v. United States*, 638 F. Supp. 824, 829 (S.D.N.Y. 1986)).

Consistent with that reasoning, the Court rejects the rule set forth in *TS Infosystems, Inc.* that the FCA's statute of limitations does not begin to run until all of the payments are made by the government pursuant to a contract. The Court finds that each allegedly fraudulent claim paid by the government to Starkey constitutes a separate claim with its own six-year statute of limitations period. *See Kreindler*, 985 F.2d at 1157. Therefore, the Court finds that Plaintiffs' claims based on payments made by the VA to Starkey prior to April 24, 1995, are barred by the FCA's six-year statute of limitations.

B. False Claims Act

The FCA imposes liability on "[a]ny person who knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). A prima facie case under the FCA requires that: (1) the defendant made a claim against the United States; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent. *See United States ex rel. Norbeck v. Basin Elec. Power Coop.*, 248 F.3d 781, 803 (8th Cir. 2001). No proof of specific intent to defraud the government is required. *See* 31 U.S.C. § 3729(b). However, "innocent mistakes and negligence are not offenses under the Act." *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 464-65 (9th Cir. 1999).

Plaintiffs allege Starkey failed to disclose certain discounts it provided to its customers during price negotiations with the VA. Starkey asserts that it complied with the VA's request for information by submitting its commercial price list and a list of general discounts. Starkey contends that the list of general discounts it provided to the VA need not have identified every discount offered to its purchasers, but instead that the list need only describe a general range of discounts offered to its purchasers.

Starkey also asserts that no business could have complied with the request for discount information as it is interpreted by the Plaintiffs. Starkey asserts that the facts of this case are analogous to those of *United States v. Data Translation, Inc.* 984 F.2d 1256 (1st Cir. 1992). In *Data Translation*, the First Circuit held that a contractor did not breach its contract with the government by failing to provide a written disclosure to the government of certain discounts that it provided to large commercial purchasers. *See id.*

The Court denies Starkey's Motion to Dismiss regarding Plaintiffs' price negotiation claims. The Court agrees with Starkey's assertion that it need not have identified every discount ever offered to its purchasers. The Court also agrees that Starkey would be entitled to dismissal of Plaintiffs' claims had Plaintiffs alleged that the terms offered to other purchasers were only slightly better than those offered to the VA. However, Plaintiffs have alleged that discounts whose terms were significantly better than those disclosed to the government were granted to certain purchasers and were in existence at the time the contract was being negotiated.

In addition, the Court finds that *Data Translation* is both factually and procedurally distinguishable from this case. In *Data Translation*, the district court heard evidence that the contractor had orally indicated to the government during the contract negotiation process that certain large purchasers received discounts in excess of those that the contractor would be willing to offer the government. *See id.* at 1264. In this case, Plaintiffs specifically allege that such discounts were not disclosed to the government. In *Data Translation*, the First Circuit also held that the contractor would not have been able to comply with a literal interpretation of the government's request for discount information. *See id.* at 1262. In this case, the Plaintiffs allege that Starkey personnel were aware of the various discounts Starkey gave at the time and were also aware that the specific discounts that it gave to other purchasers were much higher than those offered to the government. Finally, the First Circuit heard Data Translation only after the case had been tried by the district court. *See id.* at 1257. In this case, Starkey attempts to have the case dismissed even before any discovery has occurred. Based on the factual and procedural differences between this case and *Data Translation*, and for the reasons stated above, the Court denies Starkey's Motion to Dismiss Plaintiffs' price negotiation claims.

Plaintiffs also allege that Starkey failed to comply with the contract's price reduction clause. Starkey claims it is entitled to dismissal of this claim on several grounds. Starkey asserts that the failure of the VA or Williams to designate an MFC in the contract renders the price reduction clause invalid except if the prices in the established price list had been reduced for another customer. Because the Plaintiffs have not alleged the prices in the price list were reduced during the term of the contract, Starkey asserts that the price reduction clause was never triggered.

Starkey also asserts that the Plaintiffs have failed to show that the terms Starkey offered to other dealers were better than the terms offered to the VA. In particular, Starkey points out that the VA's contract did not require the VA to make additional purchases, included OPS circuitry at no cost, reduced second-year warranties by 30%, reduced the cost on options by 31%, did not include additional charges for shipping, and contained more favorable payment terms.

Plaintiffs contend that the parol evidence rule bars much of the pre-contract evidence that Starkey uses to support its contention that the price reduction clause was not meant to have its plain meaning. Plaintiffs assert that the contract did not designate an MFC or category of MFCs against which the purchasing relationship between Starkey and the government was to be measured because Starkey only sells to commercial dealers and dispensers. As a result, discounts to any purchaser below that of those offered to the government would require Starkey to notify the government of the price reduction pursuant to the contract.

Plaintiffs assert that they need not establish that every combination of goods and services resulted in a lower price for Starkey's commercial purchasers than for the government. Instead, Plaintiffs assert they need only show that the select goods and services purchased by the government were sold to Starkey's commercial customers at rates below that charged to the government.

The Court finds that Plaintiffs' allegations are sufficient to survive Starkey's Motion to Dismiss. The Court rejects Starkey's assertion that the failure of Williams or the VA to designate an MFC in the contract renders the price reduction clause invalid except if the prices in the established price list had been reduced. The government was aware that Starkey only sells its products to dealers and dispensers. The government was also told that Starkey's sales to its customers were negotiated pursuant to the commercial price list. Based on these facts, the Court finds that for the purposes of the contract the MFC would be any dealer or dispenser similarly situated to the VA.

The Court also finds that Plaintiffs have alleged that the terms offered to other purchasers were better than those offered to the VA. Plaintiffs have alleged that certain purchasers were sold items at prices less than those offered to the VA. The Court agrees with Starkey that at trial Plaintiffs will have to show that the terms negotiated by the VA when considered as a whole were not as favorable as those negotiated by other purchasers. Nonetheless, Plaintiffs' allegations are sufficient to survive Starkey's Motion to Dismiss.

Conclusion

The Court believes it is in the best interests of the parties to negotiate a resolution of this dispute. As the parties may already be aware, Magistrate Judge Susan Richard Nelson is available to assist in the negotiation of a settlement should the parties find such services to be helpful. If the Court may be of assistance in this matter, the parties should contact Lowell Lindquist, Calendar Clerk for Judge Donovan W. Frank, at 651-848-1296, or Beverly Riches, Calendar Clerk for Magistrate Judge Susan Richard Nelson, at 651-848-1200.

For the reasons stated, **IT IS HEREBY ORDERED THAT:**

1. Defendant Starkey Laboratories, Inc.'s Motion to Dismiss (Doc. No. 33) is **DENIED.**

2. Plaintiffs' Motion to Unseal the Complaint dated April 24, 2001 (Doc. No. 40) is **GRANTED.**

Dated: September 8, 2004

s/Donovan W. Frank
DONOVAN W. FRANK
Judge of United States District Court